No. 89-816

In the

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF LOS ANGELES;
BOARD OF PENSION COMMISSIONERS
OF THE CITY OF LOS ANGELES,
Petitioners,

v.

UNITED FIREFIGHTERS OF LOS ANGELES CITY,
LOCAL 112, IAFF, AFL-CIO;
LOS ANGELES POLICE PROTECTIVE LEAGUE;
RONALD DEAN GRAY; DAVID BACA, JR.;
GREGORY PAUL DUST; BILL G. MCDANIEL;
and FRED A. TREDY,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners City of Los Angeles and its Board of Pension Commissioners submit this reply brief in support of their petition for a writ of certiorari.

I. RESPONDENTS' BRIEF AVOIDS THE ISSUES IN THIS CASE.

Conspicuously absent from Respondents' Brief is a discussion of the merits of the important issues that are raised by the Petition. Respondents' unwillingness to come to grips with those issues is shown dramatically by the very first page of their Brief, where they have manufactured a new list of "Questions Presented." Respondents' list has little in common with the questions that the Petition in fact raises.

The Petition demonstrated that the courts below had departed from this Court's teaching in two important ways:

> — The California courts erred in defining the *scope* of the Contract Clause. Although a long line of cases from this Court holds squarely that "the contract clause does not limit the power of a state during the terms of its officers to pass and give effect to laws prescribing for the future the . . . compensation to be

paid to them," *Mississippi ex rel. Robertson v. Miller*, 276 U.S. 174, 178-79 (1928), the courts below used the Contract Clause to invalidate just such a law.

— The California courts also erred in defining the *standard* for finding an unconstitutional impairment of contract. Although this Court long ago abandoned the notion that to justify an impairment there must be a fiscal emergency, and although this Court requires reasonable deference to the other branches of government, the courts below held that only a "genuine emergency or severe fiscal crisis" could justify an impairment, and declined to give any deference to the judgment of Los Angeles' voters and officials that Charter Amendment H was reasonable and necessary to important public purposes. Petition at 21-29.

These issues are obviously, and necessarily, issues of federal law. This Court, not the California courts, has responsibility for defining the scope of the protection afforded by the Contract Clause. *Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1942); Petition at 9-11. Yet respondents do not attempt to reconcile the decision below with this Court's teaching that the Contract Clause permits local governments to amend statutes so as to modify the compensation they will pay for future services.[1] And although this Court, not the California courts, has responsibility to determine under what circumstances an impairment may be justified as constitutional, respondents make no effort to defend the use by the courts below of the

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[1]Respondents do not even cite the cases from this Court that are directly on point, let alone distinguish them. Dodge v. Board of Education, 302 U.S. 74 (1937); Pennie v. Reis, 132 U.S. 464 (1889); Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885); United States v. Fisher, 109 U.S. 143 (1883); Newton v. Commissioners, 100 U.S. 548 (1880); Butler v. Pennsylvania, 51 U.S. 402 (1850).

"fiscal emergency" standard that this Court has firmly rejected. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-13 (1983); Petition at 22-29.

It is equally obvious that the issues here are of great public importance, and that they affect not only the parties to this case but potentially all state and local governments and their employees. It is a matter of enormous consequence if — despite over a century of precedent from this Court to the contrary — the Contract Clause will now be held to restrict the right of governments to amend the statutes that prescribe the compensation to be paid to public employees for services to be rendered in the future. See Petition at 7-13. The rule adopted below represents a bold expansion of federal constitutional power over local government, one that is literally without precedent in this Court, and it involves a corresponding contraction of the traditional freedom of states and municipalities to regulate their own employees and to define how much of their limited resources will be spent on employee compensation and how much on other matters.

Revival of the rule that only a fiscal emergency will justify an impairment of a contract would wipe out fifty years of progress in Contract Clause doctrine. Moreover, in circumstances like the ones presented here, it would insure that no alteration in employee compensation or benefit levels, no matter how reasonable and necessary to important public purposes, can be carried out by any state or local government that has not utterly exhausted its taxing power. Such a rule would work a fundamental realignment in the relations among local government, taxpayers, and their employees. Adopting it would not be a small matter.

II. RESPONDENTS' ARGUMENTS ABOUT STATE LAW LACK SUBSTANCE.

Rather than addressing on their merits the issues raised by the Petition, respondents seek to avoid them by making two closely related arguments about state law. Neither argument is sustainable.

Respondents suggest first that review should be denied because the decision below supposedly rested on the contract clause of the California constitution. Brief in Opposition ("Opposition") at 9-12. This Court's cases, however, are clear that when a state court wishes its decision to be treated as resting on a state constitutional provision that is similar to a federal one, the state court must make a "plain statement" to that effect. *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983); *New York v. Class*, 475 U.S. 106, 109-10 (1986); *Maryland v. Garrison*, 480 U.S. 79, 83 (1987). The court below made no such "plain statement." The absence of a "plain statement" is highlighted by respondents' citation to *In re William G.*, 40 Cal.3d 550, 221 Cal.Rptr. 118, 709 P.2d 1287 (1985), since *William G.* shows that California courts know how to make a "plain statement" within the meaning of *Michigan v. Long* — if and when they wish to rest their decision on state law. The court below did not.

Nor do respondents' generalities about the independent importance of the California constitution in other situations have relevance here. "That the [state] court might have, but did not, invoke state law does not foreclose jurisdiction [in this Court.]" *Quinn v. Millsap*, 57 U.S.L.W. 4686, 4688 (June 15, 1989), *quoting Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

Finally, the court below did not suggest that the protections of the California contract clause differ in any way from those of the federal Contract Clause. Indeed, California cases are explicit that the California contract clause is merely a "parallel proscription" to the federal one. *Allen v. Board of Administration*, 34 Cal.3d 114, 119, 192 Cal.Rptr. 762, 765, 665 P.2d 534, 537 (1983); *Valdes v. Cory*, 139 Cal.App.3d 773, 783, 189 Cal.Rptr. 212, 220 (1983). The situation here is thus in marked contrast to the search-and-seizure cases that respondents cite, where the California courts used to assert, before the people of California overruled them, the independent force of the California constitution.[2]

Respondents also suggest that in holding, contrary to this Court's cases, that unearned pension benefits are protected by the Contract Clause, the court below was ruling on a matter of domestic California law, rather than construing the Contract Clause. This is nonsense. As this Court has repeatedly held and as respondents are forced to admit, a decision about whether "that which a party seeks to have protected under the contract clause . . . is a contract" is necessarily a federal question for this Court to decide, and not a domestic question for the California courts. *Douglas v. Kentucky*, 168 U.S. 488, 501 (1897); *Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1942); *Munici-*

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[2]The cases respondents cite were overruled in 1982, as to crimes committed thereafter, by the passage of Proposition 8. This initiative provides that the California courts may *not* go beyond this Court's teaching, even in the search-and-seizure area. See In re Lance W., 37 Cal.3d 873, 210 Cal.Rptr. 631, 694 P.2d 744 (1985); People v. Mayoff, 42 Cal.3d 1302, 1318n.9, 233 Cal.Rptr. 2, 729 P.2d 166 (1986). Not the least of the problems with the case at bench is that by wrapping its result in a mistaken construction of the federal Constitution, the court below has made impossible a similar legislative correction in the pension area. See Petition at 10-11.

pal Investors Ass'n v. Birmingham, 316 U.S. 153, 157 (1942); *United States Mortgage Co. v. Matthews*, 293 U.S. 232, 236 (1934); *Railroad Commission v. Eastern Texas R. Co.*, 264 U.S. 79, 86-87 (1924). This Court's cases, moreover, rest ultimately on the determination that the reserved police power of state and local government — the exercise of which power is not constitutionally subject to the limitations of the Contract Clause — extends to establishing the level of compensation that public employees will be paid for services to be rendered in the future. See *Maryland State Teachers Ass'n v. Hughes*, 594 F. Supp. 1353, 1360, 1362 (D.Md. 1984); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977); *Newton v. Commissioners*, 100 U.S. 548, 559 (1880); *Butler v. Pennsylvania*, 51 U.S. 402 (1850); *Amalgamated Transit Union Local 589 v. Commonwealth of Massachusetts*, 666 F.2d 618, 641 (1st Cir. 1981). Such a determination, involving fixing the degree of constitutional freedom which the Contract Clause gives to state and local governments so that they may fulfill their functions under our federal system, is not, and by its nature could not conceivably be, a matter of local law.

The court below did not share respondents' error on this point; it recognized that in rendering decision it was interpreting the Contract Clause. The court twice described the issue before it as whether unearned pension benefits were "obligations protected by the contract clause." App. 3a, 8a. And this analysis was entirely in accordance with the California cases generally, which use the phrase "vested contractual right" as a shorthand way of saying that a particular entitlement is protected by the contract clause. See *Kern v. City of Long Beach*, 29 Cal.2d 848, 853, 179 P.2d 799, 802 (1947); *Miller v. State of California*, 18 Cal.3d 808, 815, 135 Cal.Rptr. 386, 390, 557 P.2d 970, 973 (1977); *Allen v. Board of Administration*, 34

Cal.3d 114, 119-20, 192 Cal.Rptr. 762, 765-66, 665 P.2d 534, 537-38 (1983).[3] Indeed, the whole point of an analysis in terms of "contractual rights" is to emphasize that, in situations where no traditional contract exists, the courts need to decide which entitlements will be treated, for Contract Clause purposes, *as if* they were contracts. That task involves interpretation of the Contract Clause, not the domestic law of California. The trouble with the decision below is simply that, purporting to interpret the Contract Clause, the court below got the Contract Clause wrong.[4]

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[3]If any doubt on this point were possible, it would be removed by the California cases that have used the "vested contractual rights" analysis to determine the validity of provisions of the California *constitution*. This is possible only because the statement that an entitlement is a "vested contractual right" means precisely that it is a right protected by the Contract Clause. See Lyon v. Flournoy, 271 Cal.App.2d 774, 779, 76 Cal.Rptr. 869, 874-75 (1969); Allen v. Board of Administration, *supra*, 34 Cal.3d at 119, 192 Cal.Rptr. at 765, 665 P.2d at 537.

[4]Respondents' analysis of the California cases is seriously flawed, although as mentioned in the Petition the matter is not of great importance to the issues before this Court. Respondents rely, as did the court below, on dicta in some of the California cases, not on their facts and holdings. Other than the *Pasadena* decision, none of the California cases cited by respondents at pages 18-21 of their Opposition involved a modification, like Charter Amendment H, that affected only unearned benefits. See Petition at 8n.2. The dangers of relying on dicta are shown by respondents' prominent citation of a quotation from Carman v. Alvord, 31 Cal.3d 318, 182 Cal.Rptr. 506, 644 P.2d 192 (1982). Opposition at 20. In the sentence immediately preceding the one respondents quote, the *Carman* court defined a public employer's duty as being "to pay pensions promised *and earned*" — a formula that is consistent both with this Court's teaching and with petitioners' position. 31 Cal.3d at 325, 182 Cal.Rptr. at 509, 644 P.2d at 195.

III. RESPONDENTS' BRIEF DEMONSTRATES THAT THE COURT BELOW APPLIED THE WRONG STANDARD IN JUDGING WHETHER THERE WAS AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT.

The court below imposed on petitioners the burden of showing that a "fiscal emergency or severe financial crisis" threatened the City of Los Angeles. App. 22a. As the Petition showed, this was error: an impairment of contract will be justified if it is "reasonable and necessary" to an important public purpose, and the "fiscal emergency" standard is no longer the law. Petition at 27-29. The court below compounded its error by refusing to give any deference to the legislative judgment that Charter Amendment H was "reasonable and necessary" to purposes that even the trial court expressly found were "important." Petition at 21-27.

Far from dispelling petitioners' showing that the courts below applied the wrong standard, respondents' brief confirms it. The extracts from the trial court's opinion which respondents quote, Opposition at 6-7, confirm that, as petitioners contend, the ground of decision below was that an impairment could not be justified absent a showing that the City had exhausted its taxing power. Respondents urge explicitly, as they did below, that this is the proper standard. Opposition at 22-28.

This standard, however, is not the one adopted by this Court in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). It is not the one adopted by the Fourth Circuit in *Maryland State Teachers Ass'n v. Hughes*, 594 F. Supp. 1353 (D.Md. 1984), *aff'd*, No. 84-2213 (4th Cir. Dec. 5, 1985), App. 211a. In that case, the Fourth Circuit upheld a reform identical to Charter Amendment H even though Maryland retained the *unlimited* taxing power of a sover-

eign state. See 594 F.Supp. at 1364-71. Because the court below was using the wrong standard, it is hardly surprising that, on identical facts, it reached a result opposite to that of the Fourth Circuit. The Fourth Circuit, however, applied correctly this Court's teaching that an impairment may be justified if it is "reasonable and necessary to serve an important public purpose." *U.S. Trust Co., supra*, 431 U.S. at 25-26. The court below did not.

CONCLUSION.

For the reasons stated herein and in the Petition, this Court should issue a writ of certiorari to the California Court of Appeal, and on the merits should reverse the judgment below.

DATED: December 28, 1989

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On December 28, 1989, I served the within Reply Brief in Support of Petition for a Writ of Certiorari in re: "City of Los Angeles; Board of Pension Commissioners of the City of Los Angeles vs. United Firefighters of Los Angeles City" in the United States Supreme Court, October Term 1989 No. 89-816, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 28, 1989, at Los Angeles, California.

Marysue Bushner

MARYSUE BUSHNER